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4.00 *TAX DIVISION POLICIES AND PROCEDURES*

4.00 *TAX DIVISION POLICIES AND PROCEDURES*

There are numerous policies governing the operation of the Department of Justice, many of which are set forth in the ***United States Attorneys' Manual*** (***USAM***). Some of these policies, as implemented by the Tax Division and not otherwise covered in this ***Manual***, are discussed in the sections which follow.

4.01 *VOLUNTARY DISCLOSURE*

4.01[1] ***Policy Respecting Voluntary Disclosure***

Prior to 1952, it was the policy of the Treasury Department not to recommend criminal prosecution where a taxpayer voluntarily revealed his commission of a tax crime to an appropriate IRS official before any investigation of his affairs had commenced.

Due to the controversy which ensued in the courts over what constituted a true "voluntary disclosure," and because it was difficult, "and sometimes impossible" to ascertain administratively whether the taxpayer had made a voluntary disclosure or had merely discovered he was under investigation, the Treasury Department abandoned this policy on January 10, 1952. Treasury Department Information Release No. S-2930, 1952 C.C.H., ¶ 6079. *See* ***United States v. Shotwell Manufacturing Co.***, 355 U.S. 233, 235 n.2 (1957).

In 1961, the Internal Revenue Service adopted an "informal" policy regarding voluntary disclosure, under which it considered voluntary disclosure, along with other facts and circumstances, on a case-by-case basis in determining whether or not to recommend prosecution. *See* Statement of Commissioner Mortimer M. Caplin, News Release IR-432, Dec. 13, 1961; IRM Part IX, §9781-342.14 and CCDM Part (31)134.

In December 1992, the IRS clarified, but did not change, its "informal" policy, noting that, in the past, it had not generally recommended prosecution if the taxpayer:

1. Informed the IRS of the failure to file for one or more taxable years;

2. Had only legal source income;

3. Made the disclosure prior to being contacted by the IRS in the form of a telephone call, letter, or personal visit informing the taxpayer that he is under criminal investigation;

4. Filed a true and correct tax return or cooperated with the IRS in ascertaining his correct tax liability; and

5. Made full payment of amounts due, or in those situations where the taxpayer was unable to make full payment, made bona fide arrangements to pay.

"Peterson [IRS Commissioner Shirley D. Peterson] Formalizes Practice of Not Prosecuting Non-Filers Who Come Forward," BNA Daily Tax Report (Dec. 7, 1992).

At present, the Department of Justice continues to give consideration to a "voluntary disclosure" on a case-by-case basis in determining whether to prosecute but such disclosure is not conclusive on the issue. *See* ***United States v. Hebel***, 668 F.2d 995 (8th Cir.) *cert. denied*, 456 U.S. 946 (1982). Specifically, the Tax Division considers the timeliness of the disclosure and whether the taxpayer fully cooperated with the Government in deciding whether a disclosure was voluntary.

4.01[2] ***Timeliness of Disclosure***

There are two elements to a voluntary disclosure: (1) it must be made timely and (2) the taxpayer must thereafter fully cooperate with the government. There has been considerable debate among practitioners as to the meaning of "timely." Some argue that the test for timeliness should be strictly objective, that is, a disclosure is timely if the disclosure is made before the taxpayer's return is selected by the Internal Revenue Service for audit regardless of the taxpayer's motivation for making the disclosure. Under this approach, a disclosure would not be timely if the return had been selected for audit, even if the taxpayer did not know that the return had already been selected for audit at the time of the disclosure.

The objective test does have simplicity of application in its favor. On the other hand, if all of the circumstances are considered, then whether or not a return has been selected for audit at the

time of disclosure is not necessarily conclusive. For example, if the disclosure followed closely upon an IRS inquiry directed to a third party which reasonably could be anticipated to lead to selection of the taxpayer's return for audit, then the disclosure reasonably could be described as "triggered," rather than as "voluntary." Although not yet subject to audit, the taxpayer was obviously attempting to place himself or herself in the best light possible after concluding that an audit was inevitable. ***United States v. McCormick***, 67 F.2d 867, 868 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). Conversely, if the taxpayer was in fact clearly unaware that his or her return had been selected for audit at the time of the disclosure and "triggering" circumstances are absent, then seemingly consideration should be given for having come forward voluntarily. *Cf.* ***United States v. Levy***, 99 F. Supp. 529, 533 (D.Conn. 1951). Similarly, there may be situations where an audit is already in progress, and the taxpayer discloses a transaction that almost certainly would not have been found by the auditing agent. On a strictly objective test, the disclosure of the unknown transaction would not be a "timely disclosure" since the return was under audit.

Because the objective test is essentially arbitrary, the Department has rejected it, and, instead, favors an "all events" test in assessing whether a disclosure was timely. That is, a disclosure is not timely if:

1. The IRS has already initiated an inquiry that is likely to lead to the taxpayer and the taxpayer is reasonably thought to be aware of that activity; or

2. Some event occurred before the disclosure which the taxpayer probably knew about and which event is likely to cause an audit into the taxpayer's liabilities, e.g., a newspaper article high- lighting commercial bribery in a particular industry or corruption in a governmental office. *Cf.* ***United States v. McCormick***, 67 F.2d 867 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934).

4.01[3] ***Cooperation of Taxpayer***

If it is concluded that the disclosure was timely, a second point of inquiry is whether the taxpayer has fully cooperated with the IRS in ascertaining and paying the taxes owed. Thus, the Department's position on cooperation is that the taxpayer must make a full disclosure of all facts and cooperate with the Service in determining the proper amount of taxes owed. If the taxes are not paid because of a claim of inability to pay, then full and accurate disclosure must be made by the taxpayer of his financial position.

At bottom, application of the "voluntary disclosure" policy is an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers. Whether there is or is not a voluntary disclosure is only a factor in evaluating a case, and even if there has been a voluntary disclosure, prosecution and conviction may still result. In short, a voluntary disclosure is not a bar to prosecution, but merely a factor to be considered. *See* ***United States v. Hebel***, 668 F.2d 995 (8th Cir.), *cert. denied*, 456 U.S. 946 (1982). *See* February 17, 1993, Tax Division memorandum on ***Tax Division Voluntary Disclosure Policy*** from Acting Assistant Attorney General James A. Bruton, Tax Division. A copy of this memorandum is contained in Section 3.00 of this ***Manual***.

4.02 *DUAL PROSECUTION AND SUCCESSIVE PROSECUTION*

4.02[1] *Applicability of Policy*

The dual prosecution policy "precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution." ***United States Attorneys' Manual*** (***USAM***), § 9-2.142. For an example of a dual prosecution, see ***Thompson v. United States***, 444 U.S. 248 (1980).

The successive prosecution policy is substantially identical in wording except that it applies when there has been a prior federal prosecution rather than a state prosecution. ***USAM***, § 9-2.142. For examples of successive prosecution, *see* ***Rinaldi v. United States***, 434 U.S. 22 (1977); ***Petite v.***

United States, 361 U.S. 529 (1960). Parenthetically, the ***Petite*** case has given its name to both policies, i.e., the courts have used the "Petite Policy" interchangeably for both dual and successive prosecutions. *Cf.* ***Thompson***, 444 U.S. at 249.

These policies are not based upon double jeopardy or any other legal principle. They were established "to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts." ***USAM***, § 9-2.142. *See* ***Rinaldi***, 434 U.S. at 27; ***Petite***, 361 U.S. at 530.

The two policies are set forth in detail in ***USAM***, § 9-2.142. In order to prevent unwarranted dual or successive prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to initiating or continuing the federal prosecution. ***USAM***, § 9-2.142. In criminal tax cases, this is the Assistant Attorney General, Tax Division. 28 C.F.R., §§ 0.70, 0.179.

A failure to obtain prior authorization of a dual or successive federal prosecution will result in a loss of any conviction as the prosecutor will be required to move to dismiss the charges, unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason to explain the failure to obtain prior authorization. ***USAM***, § 9-2.142. The Department applies a common sense, nontechnical approach to the scope of the dual and successive prosecution policy in order to achieve its salutary objectives.

Requests for the authorization of dual or successive federal prosecutions are evaluated on a case-by-case basis by the appropriate Assistant Attorney General based on the factors set forth in ***USAM***, § 9-2.142. A federal prosecution will not be authorized unless the state/prior federal proceeding left substantial federal interests demonstrably unvindicated. Even so, a dual or successive prosecution is not warranted unless a conviction is anticipated. If the state/prior federal proceeding resulted in a conviction, prosecution normally will not be authorized unless an enhanced sentence in the subsequent federal prosecution is anticipated.

Vacating a conviction after trial because of a failure to follow the administrative procedures governing dual and successive prosecutions is a waste of resources. Because this waste can be easily prevented by scrupulous adherence to the procedure set forth in ***USAM***, § 9-2.142, prosecutors should familiarize themselves with and follow the procedures therein.

4.02[2] ***Tax Prosecutions***

It can be argued that neither the dual nor successive prosecution policies really applies to income tax prosecutions because even if the acts and transactions of the prior prosecution were the same income-producing activities, the tax crime did not take place until the following year when the fraudulent income tax return was filed or the failure to file happened. In other words, the failure to report income is not usually an element of the prior criminal proceeding, e.g., an embezzlement charge. Nevertheless, the Tax Division adheres to the letter and spirit of these policies in conformity with ***USAM***, § 9-2.142 that they should be applied "in a common sense, nontechnical fashion."

Similarly, dual prosecution and successive prosecution policies technically are not implicated when venue considerations precluded joinder of all the offenses in one judicial district, when the defendant opposed a single trial, or when the evidence was not obtained until after the earlier prosecution was commenced. As a practical matter, however, when a tax case is being evaluated before indictment, the better course is not to rely on these technical points to conclude that the dual and successive prosecution procedures need not be followed. Under its discussion of these policies, the ***United States Attorneys' Manual*** specifically states that prosecution will not be authorized unless a conviction is anticipated for the subsequent case, and it is thought that the second conviction will result in an enhanced sentence. ***USAM***, § 9-2.142.

For example, assume that tax and non-tax charges arising out of the same transactions are brought, and venue precludes trying all of the charges in the same district. If the non-tax charges are tried first and result in a substantial sentence, then it is questionable whether the government

should subsequently proceed with the tax charges if an enhanced sentence cannot be anticipated, unless the federal interest was not substantially vindicated by the earlier prosecution because of circumstances extraneous to the case.

In the final analysis, when there is a question as to the applicability of the dual and successive prosecution policies, the procedures set forth in ***USAM***, § 9-2.142 should be followed. If the facts are compelling in support of the conclusion that the federal interest has not been substantially vindicated, securing the Assistant Attorney General's authorization does not impose a substantial burden to processing a case through the Tax Division. Conversely, if it is determined that the subordinate reviewing attorney erred in not obtaining the authorization of the appropriate Assistant Attorney General, then there is a substantial danger that all the effort spent in securing a conviction will have gone for naught.

4.02[3] ***Pretrial Diversion***

While no specific reference is made to pretrial diversion in the section of the ***United States Attorneys' Manual*** dealing with dual and successive prosecution, the safer course is to consider pretrial diversion as within the context of these two policies even though jeopardy has not attached in that situation. "The Department has sought to apply the policy in a common sense, non-technical fashion in order to effectuate its salutary objectives." ***USAM***, §9-2.142.

USAM, § 9-22.000 does address the pretrial diversion program, but requires, among other things, prior Tax Division approval in all cases under its jurisdiction. The Tax Division's long-standing, strict policy is that criminal tax cases should not be disposed of under the Department's pretrial diversion program. This policy is stated in the transmittal letter that accompanies all criminal tax cases sent from the Tax Division to a United States Attorney's office. Accordingly, criminal tax defendants should not be given pretrial diversion treatment.

4.03 *INCARCERATED PERSONS*

4.03[1] ***General***

Whenever a proposed tax defendant is incarcerated on other charges, an initial determination must be made as to whether the Department's policies on dual and successive prosecution (Petite Policy) are applicable. *See* 4.02, *supra*. If they are, the procedures for those policies are controlling and must be followed. If it is determined that there is no connection, direct or indirect, between the acts and transactions underlying the conviction(s) for which the proposed defendant is presently incarcerated and the contemplated tax-related prosecution, then other considerations nevertheless come into play in determining whether prosecution should be initiated or declined. These considerations are discussed in the section which follows.

4.03[2] ***Prosecution of Incarcerated Persons***

Principles of Federal Prosecution, as reprinted in ***USAM***, § 9-27.000, provides as follows (***USAM***, § 9-27.230):

> A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:
>
> 1. Federal law enforcement priorities;
>
> 2. The nature and seriousness of the offense;
>
> 3. The deterrent effect of prosecution;
>
> 4. The person's culpability in connection with the offense;
>
> 5. The person's history with respect to criminal activity;
>
> 6. The person's willingness to cooperate in the investigation or prosecution of others; and
>
> 7. The probable sentence or other consequences if the person is convicted.

The above list of relevant considerations is not intended to be all-inclusive and in a given case one factor may deserve more weight than it might in another case. ***USAM***, § 9-27.230,

Subsection B.

Principles of Federal Prosecution further emphasizes the weight to be given the probable sentence in the determination as to whether criminal proceedings should be instituted as follows (***USAM***, § 9-27.230(B)(8)):

> 8. The Probable Sentence
>
> > In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. * * * (I)f the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack.

This concept is probably best understood by example. Assume that the contemplated tax defendant is presently incarcerated for the killing of his spouse, committed in the heat of passion without any income-producing ramifications, that all appellate stages have been exhausted, and that

10 years are left to be served on his sentence. If the tax case involves nothing more than the skimming of income from the proposed defendant's sole proprietorship, it would be pointless to institute a criminal tax case, for there is no reason to believe that, even if convicted, a meaningful additional sentence would be imposed. The specific deterrent value to be derived from that case would be marginal. Under this hypothetical, it would be a more efficient use of resources to resort to an "adequate non-criminal alternative to prosecution," *e.g*., "civil tax proceedings." ***Principles of Federal Prosecution***, ***USAM***, § 9-27.250, Subsection B.

Conversely, if the tax crime was accomplished by a sophisticated scheme, such as promoting a widespread fraudulent tax shelter or refund scheme, prosecution could be appropriate even though the likelihood of an enhanced sentence for the tax crime would be remote. In that instance, the conviction for the tax crime could serve to deter other individuals from embarking on the same scheme.

There will obviously be situations between these two extremes. For example, if only one year is left to be served on the nontax conviction, there may be a reason for concluding that the tax prosecution could result in a substantial, additional sentence. Another example is the submission of fraudulent returns claiming refunds by a prisoner with a long term yet to be served. A tax prosecution, as a practical matter, may not lengthen the actual time ultimately served, but it might deter other prisoners from adopting the scheme.

The effect of present incarceration on the prosecution decision is to be made on a case-by-case basis. Incarceration, of itself, does not implicate any formal policy of the Department, and the personal authorization of the Assistant Attorney General is not a condition precedent to the institution of criminal proceedings simply because the proposed defendant is currently in jail. Incarceration, however, should alert the reviewing attorney to the possibility of the dual and successive prosecution policies being an issue.

4.04 *HEALTH POLICY*

4.04[1] *General Policy*

On February 19, 1953, the Attorney General ordered the abandonment of the so-called "health policy" in criminal tax cases. Department of Justice Press Release, February 19, 1953. The Treasury Department had earlier rescinded its identical policy on December 11, 1951. The question of whether an individual could physically survive the stress and strain of a trial is, therefore, no longer a controlling consideration in deciding for or against a tax prosecution at the administrative level. The Department's position is that whether a taxpayer should or should not be tried because of health reasons is a matter which can best be decided by the trial court, rather than on an administrative basis. Only when it is clear beyond all doubt that a proposed defendant will never be able to stand trial because of a terminal physical condition is a case disposed of for reasons of health at the administrative level.

4.04[2] *Court Determination of Health Status*

After the filing of an indictment or information, physical health questions should be left to the defendant to raise. The defense is customarily raised by way of a motion for continuance. The issues basically are whether the defendant is able to assist his counsel in his defense and/or whether the strain of a trial will pose a serious threat to the defendant's health. The United States Attorney should ensure that the health facts and the court's decision are made a matter of record. The following course is to be followed in this connection: (1) the special agent of the Internal Revenue Service should be asked to conduct a discrete investigation to determine the extent of the defendant's daily activities and to eliminate the possibility of malingering; (2) a request should be made of the court to have a court-appointed physician conduct an examination and, if possible, this should include a necessary period of observation in a hospital; and (3) there should be a hearing in open court to disclose for the record the results of (1) and (2) above and to enable the court to make a finding.

The court's finding probably will not embrace a prognosis beyond the immediate necessity for a continuance. But if the record, as developed, makes it apparent that the defendant cannot ever stand trial, the United States Attorney should request authority from the Tax Division to dismiss the indictment or information. If the physical condition is only temporarily disabling, only a continuance should be permitted.

4.05 *MENTAL INCOMPETENCY*

4.05[1] *Evaluation at Administrative Level*

In criminal tax cases, where the taxpayer is in a money-producing activity during the prosecution years, lack of mental responsibility defenses are highly questionable. Because of the nature of criminal tax cases, it would be rare for a case to be referred to the Tax Division for prosecution by the Internal Revenue Service where there is clear and convincing evidence of a

mental defense calling for a decision not to prosecute at the administrative level. In the usual case where there are allegations of a mental disorder, the case is evaluated at the administrative level in the framework of whether there is guilt beyond a reasonable doubt and a reasonable probability of conviction.

The net result is that except for cases where very serious mental disorders are obvious, the Tax Division takes the position that it is up to the court to determine whether a taxpayer is competent to stand trial. This determination should be made after an indictment has been returned or an information filed in accordance with the appropriate judicial procedures. See, in this connection, the discussion which follows in Section 4.05[2], ***Insanity Defense Reform Act of 1984.***

4.05[2] ***Insanity Defense Reform Act of 1984***

The ***Comprehensive Crime Control Act of 1984***, Pub. L. No. 98-473, 98 Stat. 1837, made a significant series of changes in numerous areas of the federal criminal justice system. Chapter IV of the Act contains the ***Insanity Defense Reform Act of 1984***, Pub. L. No. 98-473, 98 Stat. 1837, 2057, which governs, among other things, the insanity defense and the determination of mental competency to stand trial. Where applicable, the provisions of the Insanity Defense Reform Act can have a significant bearing on the administrative evaluation of criminal tax cases as well as on trial procedures.

The Department of Justice has issued a handbook which is designed to assist prosecutors and investigators in the review and implementation of the Comprehensive Crime Control Act of 1984, *supra*, and ten other statutes. ***Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress*** (Handbook), Department of Justice (December, 1984). [1]

The Handbook summarizes the changes made by the Insanity Defense Reform Act of 1984, and the applicability of those changes as follows (Chapter IV, p. 58):

> The most significant provisions of chapter IV: (1) significantly modify the standard for insanity previously applied in federal courts; (2) require the defendant to prove the defense of insanity by clear and convincing evidence; (3) limit the scope of expert testimony on ultimate legal issues; (4) eliminate the defense of "diminished capacity"; (5) create a special verdict of "not guilty only by reason of insanity" which triggers a federal civil commitment proceeding; and (6) provide for federal commitment of persons who become insane after having been found guilty or while serving a federal prison sentence.

Reference should always be made to the Handbook for questions relating to an insanity defense or where there is an issue as to mental competency to stand trial. In the latter connection, Chapter IV replaces the prior provisions of Chapter 313 of Title 18 with new statutory provisions, 18 U.S.C., Sec., 4241 through 4247. Section 4241 of Title 18 governs procedures for the determination of competency to stand trial and related commitments of the defendant. Under Section 4241, if competency is perceived to be an issue by the prosecutor, by defense counsel, or by the court itself, a psychiatric examination may be ordered and a hearing is to be held on the defendant's competency to stand trial. For a more complete examination of Section 4241, see the Handbook, at 62, E.1.

4.06 *SEARCH WARRANTS*

4.06[1] *Generally*

Department of Justice policy formerly required that all search warrants in criminal tax cases be approved in advance by the Tax Division. This policy was based upon the premise that the law on search warrants was so unsettled that strict scrutiny was warranted. In recent years, the case law concerning search and seizure developed to a point where it became clear that, upon a showing of probable cause, the government could conduct reasonable searches for the purposes of obtaining documentary evidence establishing the commission of a crime.

With case law becoming more settled, the Assistant Attorney General, Tax Division, by

Directive No. 52 (January 2, 1986), which superseded an earlier 1984 Directive No. 49, delegated to certain personnel in United States Attorneys' offices the authority to approve the execution of certain limited Title 26 or tax-related Title 18 search warrants directed at offices, structures, premises, etc., of targets or subjects of the investigation. The existing authority delegated to United States Attorneys' offices and the authority reserved to the Tax Division contained in Tax Division Directive No. 52, is reproduced in Section 3.00 of this ***Manual***. *See also* ***USAM***, § 6-4.130.

4.06[2] ***Procedures Under Directive No. 52***

In those instances where authority to approve a search warrant has been delegated to the United States Attorney's office, a direct request for a search warrant may be made by District Counsel, I.R.S., to the United States Attorney's office. Note, however, that in the United States Attorney's office, the only persons who can approve the application for a search warrant are the United States Attorney, the First Assistant United States Attorney, or the Chief of the Criminal Division in the office. This authority to approve cannot be delegated to anyone else in the office of the United States Attorney.

The name and telephone number of the Assistant United States Attorney(s) in each office who, in addition to the United States Attorney, is authorized to approve search warrants under the delegated authority is to be forwarded to the Tax Division. The names will be retained in the Tax Division files, with a copy given to the Internal Revenue Service.

Because the questions of privilege and status in the investigation remain sensitive legal issues, the Tax Division has delegated the authority to approve search warrants in tax cases only in those limited instances where the search warrant is directed at offices, structures, or premises owned, controlled, or under the dominion of the subject or target of a criminal investigation. The subject, or target, moreover, must not fall into the eight exempted categories listed in the delegation order (Directive No. 52, para. 4). The exempted categories, which include accountants, lawyers, physicians, public official/political candidates, members of the clergy, news media representatives,

labor union officials, or officials of 501(c)(3) tax exempt organizations, are deemed to be of such a sensitive nature that prior approval of the Tax Division is still required before a search warrant is obtained.

Aside from questions of strict legality, search warrants in tax investigations involve potential problems and issues intrinsic to tax cases. The concept of seizing personal or business books and records as the evidence or instrumentality of a crime is not as direct or simple as the seizure of contraband. These documents can contain information considered to be personal and confidential, and these very same documents, which, by their own nature, are not unusual, illegal, or dangerous, will be the evidence or the instrumentality of the crime to be charged. In addition to the controversial nature of such a seizure of documents, the requirement that the items to be seized must be named with specificity is more difficult to meet. In tax cases, the warrant must be specific, not only regarding the items to be seized and the place searched, but a specific time frame must also be stated, *e.g.*, records for the years 1990 and 1991.

4.07 ***APPEALS***

The procedures and rules governing appeals are set forth in the ***USAM***, § 2-1.000 *et seq.*, and § 9-2.171, and should be reviewed and followed when handling a criminal tax or other appellate matter. Attention is called to the particular following procedures set forth in the ***USAM***.

In all cases resulting in adverse decisions, all recommendations for and against appeal, the filing of a petition for certiorari, and direct appeal to the Supreme Court must be authorized by the Solicitor General. This includes interlocutory appeals under 28 U.S.C., Sec. 1292(b) and litigation in state courts subject to review by a higher state court or by the United States Supreme Court. It also includes the filing of an amicus curiae brief, petitions seeking mandamus or other extraordinary relief, and the filing of a suggestion for a rehearing *en banc*. ***USAM***, § 2-2.120 and § 9-2.171.

The United States Attorney has the appellate responsibility for the handling of criminal tax

cases in the courts of appeals that have been tried by the United States Attorney unless the Assistant Attorney General, Tax Division, elects that the Tax Division handle a particular category of cases or a case on appeal. ***USAM***, § 2-3.100.

The Tax Division, and specifically the Criminal Appeals & Tax Enforcement Policy Section (CATEPS), has the appellate responsibility for the handling of criminal tax cases that have been tried by personnel of the regional Criminal Enforcement Sections of the Tax Division. ***USAM***, § 2-3.100.

The need for immediate reporting of adverse decisions, whether at the trial level or the appellate level, is stressed in ***USAM***, § 2-2.110 as follows:

> In any civil or criminal action before a United States District Court or a United States Court of Appeals, in which the United States is a litigant, and a decision is rendered adverse to the government's position, the U.S. Attorney must immediately transmit a copy of the decision to the appellate section of the division responsible for the case.

To secure the necessary authority from the Solicitor General to appeal or not appeal a criminal tax case, the United States Attorney or the Chief of the appropriate regional Criminal Enforcement Section of the Tax Division "must promptly" make a report to the Chief, Criminal Appeals & Tax Enforcement Policy Section (CATEPS), Tax Division. See ***USAM***, § 2-2.110, *et seq*. The Tax Division prefers that such reports be made *promptly by telephone* to the Chief of CATEPS at (202) 514-3011.

Following receipt of an adverse decision, CATEPS solicits the views of the regional Criminal Enforcement Section of the Tax Division, the United States Attorney, and the Internal Revenue Service on appropriate further action. CATEPS then prepares a Tax Division memorandum for the Solicitor General which reflects the views and recommendation of the Tax Division, as well as the views of those solicited. In cases tried by Criminal Enforcement Section personnel of the Tax Division, the Tax Division prosecutor should confer with the United States

Attorney with respect to the recommendation to be made by the Criminal Enforcement Section to CATEPS. ***USAM***, § 2-3.100.

For these and other issues relating to appeals in criminal tax cases, contact the Chief, CATEPS, Tax Division at (202) 514-3011.

4.08 *REQUESTS FOR TRIAL ASSISTANCE*

While United States Attorneys usually have the initial responsibility for the trial of criminal tax cases, the Criminal Enforcement Sections of the Tax Division have staffs of highly qualified and specialized criminal tax trial attorneys who will prosecute or render assistance in the trial of criminal tax cases upon request. The assistance, for example, may be in the form of a senior Criminal Enforcement Section attorney of the Tax Division assuming all trial responsibilities of a particular case or in the form of a junior attorney of the Tax Division acting as co-counsel with an Assistant United States Attorney.

If trial assistance is needed, the request should be in writing, stating the relevant reasons, and made well in advance of any court setting. Requests for assistance should be addressed to the Chief of the appropriate Criminal Enforcement Section, Tax Division, Department of Justice, Washington, D.C. 20530. Where time is a factor, the request may be by phone to the appropriate Chief. Such telephone requests should be confirmed in writing. *See* Section 1.02 of this ***Manual***, *supra*.

4.09 *STATUS REPORTS*

After criminal tax cases have been referred to a United States Attorney, it is essential that the Tax Division be kept advised of all developments. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

1. A copy of the indictment returned (or no billed), or the information filed, which reflect the date of the return or filing, and the date of any no bill;

2. Date of arraignment and kind of plea;
3. Dates of trial;
4. Verdict and date verdict returned;
5. Date and terms of sentence; and
6. Date of appeal and appellate decision.

It is important that information regarding developments in pending cases be provided to the Tax Division in a timely manner in order that the Department's files reflect the true case status and so that, upon completion of the criminal case, the case can be timely closed and returned to the Internal Revenue Service for the collection of any revenue due through civil disposition.

4.10 *RETURN OF REPORTS AND EXHIBITS*

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the United States Attorney should return to witnesses their exhibits. All other grand jury material should be retained by the United States Attorney under secure conditions, in accordance with the requirement of maintaining the secrecy of grand jury material. Fed. R. Crim. P. Rule 6(e).

All non-grand jury reports, exhibits, and other materials furnished by the Internal Revenue Service for use in the investigation or trial should be returned by certified mail, return receipt requested, to the appropriate District Director, Internal Revenue Service, Attention: Chief, Criminal Investigation Division, as directed in the Tax Division's letter authorizing prosecution, or as directed by Regional Counsel in cases directly referred to the United States Attorney.

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1. The handbook is available for searching on JURIS in the ***Statlaw*** file group.